A

I-MARCOM SDN BHD v. RESHAM SINGH NARANJAN SINGH & ORS

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
AZIMAH OMAR JCA
B AHMAD KAMAL MD SHAHID JCA
[CIVIL APPEAL NO: W-02(NCvC)(W)-472-03-2023]
19 SEPTEMBER 2025

C **Abstract** – *A guaranteed rental return scheme ('GRRS') offered by a developer's authorised agent as an inducement to purchase a property, covered by a statutory sale and purchase agreement ('SPA') under the Housing Development (Control and Licensing) Act 1966 ('HDA') and the Housing Development (Control and Licensing) Regulations 1989 ('HDR'), can be binding on the developer, provided that: (i) the agent* D *who made the representation was acting with actual or ostensible authority from the developer; (ii) the GRRS is an ancillary benefit or collateral promise that does not contravene or vary the statutory provisions of the SPA and is not illegal under the HDA or the HDR; and (iii) the purchaser was induced to enter into the SPA as a result of the* E *representations concerning the GRRS.*

AGENCY: *Agent – Development project – Exclusive agent for development project made representations to purchasers – Guaranteed rental return scheme – Purchasers entered into sale and purchase agreements upon inducement by agent – Developer* F *did not honour promise of scheme – Allegation by developer that it had no knowledge of scheme for project and did not authorise agents to enter into any scheme with purchasers – Whether agent was agent of developer – Whether agent made purported representations – Whether purported representations binding on developer*

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LAND LAW: *Sale and purchase agreement – Condominium units – Purchase of – Exclusive agent for development project made representations to purchasers – Guaranteed rental return scheme – Purchasers entered into sale and purchase agreements upon inducement by agent – Developer did not honour promise of* H *scheme – Allegation by developer that it had no knowledge of scheme for project and did not authorise agents to enter into any scheme with purchasers – Whether agent was agent of developer – Whether agent made purported representations – Whether scheme legal and valid – Whether purported representations binding on developer – Housing Development (Control and Licensing) Act 1966 – Housing Development (Control and Licensing) Regulations 1989*

I

CONTRACT: *Agreement – Sale and purchase agreement – Purchase of condominium units – Guaranteed rental return scheme – Exclusive agent for development project made representations to purchasers – Purchasers entered into sale and purchase agreements upon inducement of scheme by agent – Whether scheme legal and valid*

The appellant was the developer of a high-end condominium project. The first to fifth respondents were a family. The first respondent ('Resham') was keen on purchasing the condominium units for himself and his family. An estate agent ('Beh') had invited Resham to attend the launch of the sale of the condominiums at a restaurant. Beh then introduced Resham to one Edward, who was from TE Asia Properties Group Sdn Bhd ('TE Asia'). TE Asia, according to Beh, was the appellant's exclusive agent for the project. The respondents alleged that the appellant, through Edward, represented to Resham that: (i) the appellant was offering a guaranteed rental return scheme ('GRRS'); (ii) the price of the property sold for the project was slightly higher than the current market price for such properties, as the appellant had agreed to provide to interested purchasers the GRRS; and (iii) the GRRS would be for a period of five years commencing from the date when vacant possession was delivered at 5% per annum based on the purchase price. Resham, induced by the representations made by Edward on behalf of the appellant, (i) purchased four condominium units and paid to the appellant 10% of the purchase price, *ie*, RM120,000; and (ii) executed the details of purchase form for each of the units. The conditional ownership package plan ('COPP') forms, which contained the discounts, alleged representations and details of the property, were also filled in by Beh and Resham's daughter, *ie*, the third respondent ('Ranita'). A meeting was subsequently held, between Resham, his wife, *ie*, the second respondent ('Kalwant'), Ranita, Edward, Beh and the appellant's solicitors. In the meeting, Edward and Beh reiterated the representations concerning the GRRS to Resham, Kalwant and Ranita and that the GRRS would be executed upon delivery of vacant possession. Based on the representations made by Edward and/or TE Asia, four sales and purchase agreements ('SPAs') were executed. When the condominiums were completed, the respondents were informed of this and were given notice to take delivery of vacant possession. Ranita wrote to the appellant to inform that, since the respondents were taking vacant possession, the appellant was to honour the representations made by TE Asia on behalf of the appellant on the GRRS and that but for the GRRS, the respondents would not have purchased the four condominium units. The appellant replied that: (i) it had no knowledge of the GRRS for the project and neither did the appellant enter into any GRRS with any purchaser; (ii) it did not consent, agree or authorise TE Asia to enter into any GRRS with any purchaser; and (iii) TE Asia had been wound up and had been terminated as their agent. This led the respondent to launch a suit against the appellant, at the High Court, claiming for, among others, loss of rental of five years in respect of the four condominium units. The Judicial Commissioner ('JC') allowed the respondents' claim. Hence, the present appeal. The issues that arose in this

A appeal were: (i) whether Edward and/or TE Asia was an agent of the appellant; (ii) whether Edward and/or TE Asia made the purported representations; (iii) whether the GRRS was illegal; and (iv) whether the purported representations were binding on the appellant.

B **Held (dismissing appeal)**
Per Ahmad Kamal Md Shahid JCA delivering the judgment of the court:

(1) The appointment of TE Asia as its exclusive marketing agent had been admitted by the appellant through the following documentary evidence: (i) Ranita, on behalf of the respondents, had written a letter to the appellant which expressly stated that TE Asia was the exclusive marketing agent for the appellant. The appellant, in its reply, did not dispute and/or repudiate the fact that TE Asia was the exclusive agent of the appellant and, in fact, admitted that TE Asia was its agent; (ii) the appellant had lodged a police report to state, among others, that the appellant had no knowledge of the purported GRRS as alleged by the purchasers of the project. Based on the police report, the appellant had clearly admitted that TE Asia, at the material time, was the marketing agent for the appellant before it was terminated in 2015; (iii) the respondents had relied on the sales brochure and representations made by Edward who was the marketing executive of TE Asia and they were, in turn, the authorised agent of the appellant. Based on the contents of the sales brochure and the provisions of the Housing Development (Control and Licensing) Act 1966 ('HDA') and the Housing Development (Control and Licensing) Regulations 1989 ('HDR'), it was clear that the appellant had represented to the public at large that TE Asia was its authorised agent; and (iv) the fact that TE Asia had the details of the purchase form which had been prepared by the appellant and that TE Asia was collecting the cheque for the partial payment on behalf of the appellant showed that TE Asia was an authorised agent of the appellant. Further, the following vital evidence of Resham and Ranita were not challenged by the appellants: (i) the 10% rebate given by the appellant based on the remarks in the COPP forms; (ii) the four condominium units were fully furnished; and (iii) the legal fees for the SPAs were borne by the appellant. (paras 29-31, 36, 38, 45, 78 & 87)

(2) TE Asia and/or Edward had made representations on the GRRS. This could be gleaned from the evidence of Resham and Ranita as follows, *inter alia*, (i) Resham was introduced to Edward by Beh and Edward had introduced himself as the exclusive marketing agent from TE Asia for the sale of the condominium units; (ii) Edward had handed over the sales brochure of the project and explained the potential of investing in the project and represented that the appellant had agreed to offer to the interested purchasers a GRRS; (iii) Edward represented to Resham that the appellant was offering a GRRS for a period of five years commencing from the date when vacant possession was delivered at 5% per annum of the purchase price; (iv) Beh attended to the signing of the

new details of purchase forms and the COPP forms with the names of the second to fifth plaintiffs included. Beh again informed Ranita and Kalwant that the appellant was offering the GRRS; (v) during the signing of all four SPAs, Edward had informed that the appellant will execute the GRRS agreement at a later date; and (vi) when Ranita made repeated calls to Edward for the execution of the GRRS, she was informed that the appellant would execute the GRRS agreement once vacant possession was delivered. (paras 90 & 91)

(3) The COPP forms were contemporaneous documents which supported the fact that the appellant had offered the GRRS which the respondents had accepted. More importantly, TE Asia had not only made the representations on the GRRS to the respondents but also to the other purchasers of the project. This could be seen from the COPP forms which were signed by other purchasers. (paras 92 & 93)

(4) The HDA was a social legislation designed to protect house buyers and its standard sale and purchase agreement ('Schedule H') form was a statutory contract. It followed that any added burdensome or detrimental clauses beyond Schedule H would be unenforceable as part of the statutory contract. Statutory contracts, like the SPA under Schedule H, have a consumer protection purpose and developers cannot contract out or vary these provisions in a way that defeats that purpose. The GRRS was certainly not a burden on the purchasers. Instead, it was a financial boon and amounted to a separate benefit, not a deviation from or alteration to any clause under Schedule H. It was an ancillary promise made to incentivise purchase but did not supersede or modify statutory rights or obligations in the SPA. The developer retained the right to add such benefits, provided the statutory form remains intact and unaltered. There was no legal principle in the HDA or the HDR that categorically prohibited additional incentives – even if these have the effect of inducing the buyer. (paras 110, 111, 113, 117 & 118)

(5) The statutory contract (the SPAs) under Schedule H of the HDR was intact and fully operative and the GRRS remained a valid and collateral benefits which did not directly or indirectly contravene the HDA or the HDR. As such, the GRRS did not suffer from any form of illegality. (para 122)

(6) Based on the findings of the above three issues, the representations made by Edward, who was the authorised agent of TE Asia, who was an exclusive agent for the appellant, that the project came with the GRRS and the GRRS agreement would be executed at a later date, was binding on the appellant. The respondents were induced to enter into the SPAs as a result of the representations made by Edward and the appellant had failed to fulfil the representations made to the respondents. The appellant was bound by the representations made by Edward on behalf of the appellant as the exclusive agent. (paras 123 & 126)

Case(s) referred to:

Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case [1985] 1 CLJ 533; [1985] CLJ (Rep) 64 FC ***(refd)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA

Khazanah Jaya Sdn Bhd v. Hisco (M) Sdn Bhd [2021] CLJU 2196 CA

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:

Contracts Act, ss. 24, 179

Evidence Act 1950, s. 114(g)

Housing Development (Control and Licensing) Regulations 1989, regs. 5, 6(1), Schedule H

Rules of Court 2012, O. 18 r. 12

For the appellant/defendant - Malik Imtiaz Sarwar, Clinton Tan Kian Seng & Wong Ming Yen; M/s Clinton Tan

For the respondents/plaintiffs - B Thangaraj & M Nalani; M/s Thangaraj & Assocs

[Editor's note: For the High Court judgment, please see Resham Singh Naranjan Singh & Ors v. I-Marcom Sdn Bhd [2023] CLJU 475; [2023] 1 LNS 475 (affirmed).]

Reported by Lina E

JUDGMENT

Ahmad Kamal Md Shahid JCA:

Introduction

[1] This is an appeal by I-Marcom Sdn Bhd (the appellant/the defendant), against the decision of the learned Judicial Commissioner (JC) given on 8 March 2023 in allowing the claim brought by Resham Singh a/l Naranjan Singh (the first respondent/the first plaintiff) and four others (collectively referred to as the respondents/the plaintiffs) for the losses suffered by the respondents/plaintiffs who had acted based on the misrepresentation made by the exclusive agents of the appellant/defendant regarding a rental return scheme which led the respondents/plaintiffs to purchase four condominium units.

[2] We heard the appeal on two occasions, *ie*, on 10 January 2025 and 18 June 2025, and reserved the same for decision. Having heard the appeals, examined the appeal records and considered the submissions by the parties, we decided to dismiss the appellant's/defendant's appeal. This is now the full grounds for our decision.

[3] For easy reference, the parties hereinafter will be referred to in their capacity in this appeal, *ie*, the plaintiffs as the respondents and the defendant as the appellant.

Background Facts

[4] The appellant is a developer of a high-end condominium project known as 8 Kia Peng Project, at Kuala Lumpur (the project).

[5] The first respondent (Resham) and the second respondent (Kalwant) are husband and wife. The third respondent (Ranita) is their daughter. The fourth and fifth respondents (Rajash and Resham Jr) are their sons.

[6] Resham was keen to purchase condominium units near the vicinity of Kuala Lumpur City Centre (KLCC) for himself and his family.

[7] An estate agent by the name of Beh Seok Tee (Beh), who was known to Resham for more than 15 years in real estate transactions, had represented to Resham that the project was located near KLCC. She invited Resham to attend the launch of the sale of the condominiums at Top Hat Restaurant on or about 17 April 2015, which was located opposite the project.

[8] On the date of the launch, Beh introduced a person by the name of Edward Lim of TE Asia Properties Group Sdn Bhd (TE Asia) to Resham. Beh had also informed that TE Asia was the appellant's exclusive agent for the project.

[9] The respondents alleged that the appellant, through Edward Lim, did represented to Resham that:

(i) the appellant is offering a guarantee rental return scheme (GRR scheme);

(ii) the price of the property sold for the project is slightly higher than the current market price for such properties, as the appellant had agreed to provide to interested purchasers the GRR scheme; and

(iii) the GRR scheme will be for a period of five years commencing from the date when vacant possession is delivered at 5% per annum based on the purchase price.

[10] Resham was induced by the said representations made by Edward Lim, on behalf of the appellant. Resham then agreed to purchase four condominium units and paid the total sum of RM120,000 to the appellant as part payment of 10% of the purchase price.

[11] Resham had executed a document entitled details of purchase form for each of the units. The conditional ownership package plan (COPP) forms, which contained the discounts, alleged representations and details of the property, were also filled in by Beh and were to be filled in by Resham or his representative or nominee at a later date.

[12] The COPP Forms were executed by Ranita on 23 April 2015 in the presence of Beh. Ranita further alleged that the representations regarding the GRR scheme were also communicated to her by Beh on the said date, before she agreed to the COPP.

[13] A meeting was subsequently held on 3 July 2015 at the premises of Messrs Kington Tan Dzul, solicitors for the appellant. Resham, Kalwant and Ranita were present at the said meeting in the presence of Edward Lim, Beh, and one Ms Shamla Vasuki a/p Karumah, a solicitor at Messrs Kington Tan Dzul.

[14] The respondents further contended that Edward Lim and Beh reiterated the above representations concerning the GRR scheme to Resham, Kalwant and Ranita and that the GRR scheme will be executed upon delivery of vacant possession, as the appellant had allegedly not wanted to disclose the existence of the GRR scheme to its end financiers.

[15] Based on the representations made by Edward Lim and/or TE Asia, four sales and purchase agreements (the SPAs) were executed as follows:

(i) the SPA dated 3 July 2015 between Resham and Kalwant, with the appellant (unit no 38-11) (SPA-1);

(ii) the SPA dated 3 July 2015 between Kalwant and Ranita, with the appellant (unit no 35-11) (SPA-2);

(iii) the SPA dated 7 December 2015 between Kalwant and Rajash with the appellant (unit no 37-11) (SPA-3); and

(iv) the SPA dated 7 December 2015 between Kalwant and Resham Jr with the appellant (unit no 33-11) (SPA-4).

[16] By respective letters dated 24 June 2020 to the respondents, the appellant informed the respondents that their respective condominiums were completed, and the respective respondents were given notice to take delivery of vacant possession within 14 days from 24 June 2020.

[17] By letter dated 6 July 2020, Ranita, on behalf of all the respondents, had written to the appellant to inform that since the respondents are taking vacant possession, the appellant is to honour the representations made by TE Asia on behalf of the appellant on the GRR scheme. In the same letter, Ranita informed the appellant that, but for the GRR scheme, the respondents would not have purchased the four condominium units.

[18] The appellant had, by letter dated 10 July 2020, informed that it had no knowledge of the GRR scheme for the project and neither did the appellant enter into any GRR scheme with any purchasers. The appellant did not consent, agree or authorise TE Asia to enter into any GRR scheme with any purchasers. Further, the respondents were also informed that TE Asia has been terminated as their agent and TE Asia has been wound up.

In The High Court

[19] This led the respondents to file a civil suit against the appellant in the High Court, claiming for, among others, loss of rental of five years in respect of the four condominium units, interest and cost.

[20] The appellant denied the said claim, and in their defence, they maintained that:

(i) the appellant had no knowledge of the purported GRR scheme, nor had it offered any GRR scheme for any of its projects;

(ii) TE Asia was an underwriter of the project pursuant to an underwriting agreement dated 1 April 2015 (the underwriting agreement) in which, among others, in cl. 16 stated that parties agreed that the underwriting agreement "shall not create any form of partnership whatsoever between the parties and nothing in this agreement shall be construed to make any party hereto the representative or agent of the other party";

(iii) TE Asia did not act as its agent but was an independent party that had purchased units within the project, as seen in the underwriting agreement;

(iv) TE Asia was not authorised to provide any such representations to the respondents;

(v) the terms of the agreements between parties are only encompassed in the SPAs, which are subject to the strict requirements of the Housing Development (Control and Licensing) Act 1966 (the HDA) and the Housing Development (Control and Licensing) Regulations 1989 (the HDR);

(vi) the appellant did not prepare and did not authorise the COPP forms as suggested by the respondents, and it did not have any knowledge concerning the said plan or the representations made by TE Asia; and

(vii) the SPAs and the related deeds of mutual covenants did not make any reference to the said GRR scheme.

Findings Of The Learned JC

[21] The learned JC allowed the respondents' claim with variation to the amount claimed. Briefly, the learned JC's findings were as follows:

(i) the respondents have proven that Edward Lim and/or TE Asia did make the representations concerning the GRR scheme and that the said representations did induce them to enter into the SPAs;

(ii) the surrounding circumstances of this case indicated that Edward Lim and TE Asia had the authority to act as the agent of the appellant;

(iii) the appellant is bound by the said representations as to the alleged existence of the GRR scheme, the breach of which entitles the respondents to a cause of action in damages;

(iv) the underwriting agreement is merely an internal agreement between TE Asia and the appellant and did not negate the respondents' claim against the appellant;

(v) TE Asia is the agent of the appellant. Despite the wordings in cl. 16, the underwriting agreement when read as a whole, supported the inference that TE Asia was the appellant's agent;

(vi) the said representations would not transgress the purpose of any legislation or defeat any relevant public policies or render ineffective or less effective any public policies. The recognition of the representations made by the appellant's agent should be enforced;

(vii) the HDA and HDR are not infringed, and there are no attempts to circumvent the requirements of the same;

(viii) the said representations are not unlawful and do not contravene s. 24 of the Contracts Act 1950; and

(ix) as the respondents have proven their claims against the appellant, and after considering the steps taken by the respondents to mitigate the damages claimable against the appellant, the respondents are entitled to the following revised remedies:

(a) RM403,115.57 to be paid by the appellant to Resham and Kalwant for unit no 38-11;

(b) RM413,930.13 to be paid by the appellant to Kalwant and Rajash for unit no 37-11;

(c) RM420,593.80 to be paid by the appellant to Kalwant and Ranita for unit No. 35-11; and

(d) RM416,112.09 to be paid by the appellant to Kalwant and Resham Jr for unit no 33-11.

[22] Dissatisfied, the appellant lodged an appeal against the said decision of the High Court to the Court of Appeal.

The Appeal

[23] The issues for determination in this appeal may be summarised as follows:

(i) whether Edward Lim and/or TE Asia was an agent of the appellant;

(ii) whether Edward Lim and/or TE Asia made the purported representations;

(iii) whether the GRR scheme is illegal; and

(iv) whether the purported representations were binding on the appellant.

Our Findings

Issue (i): Whether Edward Lim And/Or TE Asia Was An Agent Of The Appellant

[24] The appellant submitted that the respondents must establish, on a balance of probabilities, that TE Asia was an agent or exclusive marketing agent of the appellant such that it had the authority to bind the appellant pursuant to s. 179 of the Contracts Act 1950.

[25] Section 179 of the Contracts Act 1950 states as follows:

> Enforcement and consequences of agents' contracts
>
> Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

[26] The appellant further submitted that the respondents failed to show that there had been an actual appointment of TE Asia as the agent or exclusive marketing agent of the appellant.

[27] At para. 11 of the respondents' statement of claim (SOC), it was pleaded that:

> 11: I-Marcom had appointed TE Asia as its exclusive marketing agent for the 8 Kia Peng project.

[28] According to the appellant, the case that the respondents had to meet was that, as a matter of fact, the appellant had appointed TE Asia to act as its agent. Otherwise, the respondents' entire claim would fail.

[29] Having perused the evidence presented before this court, we find that the appointment of TE Asia as its exclusive marketing agent, as pleaded by the respondents in para. 11 of its SOC, had been admitted by the appellant through the following documentary evidence:

The Appellant's Letter Dated 10 July 2020

[30] Ranita, on behalf of the respondents, had written a letter dated 6 July 2020 which expressly stated that TE Asia is the exclusive marketing agent for the appellant.

[31] However, the appellant, by a letter dated 10 July 2020, which was in reply to Ranita's letter dated 6 July 2020, did not dispute and/or repudiate the fact that TE Asia is the exclusive agent of the appellant and, in fact, admitted that TE Asia was its agent.

[32] This can be gleaned from the relevant part of the appellant's letter as follows:

> Notwithstanding anything to the contrary, **we state that we had terminated TE Asia Properties Group Sdn Bhd as our agent**, and TE Asia Properties Group Sdn Bhd has also been wound up. We hereby officially confirm that we have no knowledge of the GRR arrangement, and we are not involved in whatsoever GRR arrangement with any party.
>
> (emphasis added)

(See: encl. 13 – p. 182).

[33] We find that the stand taken in the above letter regarding the relationship between the appellant and TE Asia clearly and unequivocally demonstrated that the appellant regarded TE Asia as their "agent".

[34] In Ranita's letter dated 6 July 2020, described TE Asia as the appellant's "agent", there was no denial on the part of the appellant that TE Asia was its exclusive marketing agent based on the letter dated 10 July 2020.

[35] This is also supported by the evidence of Monica Ong Poh Ling, a director of the appellant (Monica Ong/DW1) and Chua Beng Hua, the appellant's financial controller (Chua/DW2), who testified as follows:

Monica Ong (DW1)

BT: Monica, we are at page 367. Based on this letter Monica, you agree that as at 10/07/2020, *the stand taken by the defendant is that TE Asia is the agent of the defendant*. Is that correct

ONG: *Yes, in this letter.*

BT: By this letter. And you said that, "we state that we have terminated TE Asia Properties as our agent". *Do you agree Monica that there is no letter produced to show what kind of termination, how do you terminate TE Asia? Is that correct*?

ONG: It is -

BT: I am asking a question. *You did not produce the letter whether they were terminated as underwriting agent or what agent? Nothing is stated there, isn't it*? That letter was not produced.

ONG: Yes.

(emphasis added)

(See: encl. 5, pp. 159 to 160).

Chua (DW2)

BT: Ok, look at your reply at page 367. *Do you agree that this letter, which was prepared by you, correct? Letter was prepared by you?*

CHUA: *Yes.*

BT: In response to the plaintiff's letter? A

CHUA: In reply to the plaintiff's letter, yes.

BT: Do you agree that *in your reply, you did not deny that TE Asia is not the exclusive marketing agent of the defendant?*

CHUA: I think – B

BT: No, *do you agree, it is not denied in your letter, in your reply.*

CHUA: *This letter, I didn't deny but I think the letter for:*

BT: *It is ok. You did not deny, right?*

CHUA: *Yes* C

(emphasis added)

(See: encl. 5, p. 188).

Police Report By The Appellant Dated 21 July 2020

[36] It is to be noted that after the vacant possession of the four condominium units was delivered to the respondents, the appellant had lodged a police report on 21 July 2020 to state, among others, that the appellant had no knowledge of the purported GRR scheme as alleged by the purchasers of the project. D

[37] In the police report lodged by Monica Ong (DW1) as the director of the appellant, the appellant stated that the appellant had terminated TE Asia as its agent. The relevant part of the police report is herein reproduced as follows: E

> ... I-Marcom Sdn Bhd berasa hairan dan terkejut terhadap tuntutan GRR tersebut, kerana TE Asia Properties Group Sdn Bhd telah bercuri-curi memasuki perjanjian dan membuat penyataan mengenai GRR dengan pembeli projek 8 Kia Peng. *TE Asia Properties Group Sdn Bhd merupakan ejen pemasaran untuk 8 Kia Peng projek tersebut yang mana kontraknya telah ditamatkan pada sekitar akhir tahun 2015 dan sebagai ejen pemasaran untuk 8 Kia Peng projek tersebut, tanggungjawab TE Asia Properties Sdn Bhd hanya adalah untuk memasar dan menjual projek tersebut* dan bukannya membuat sebarang perjanjian terhadap GRR. F G
>
> (emphasis added)

(See: encl. 13, p. 185).

[38] We find that, based on the police report, the appellant had clearly admitted that TE Asia, at the material time, was the marketing agent for the appellant before it was terminated around the end of 2015. H

[39] The words used in this paragraph of the police report clearly show that it is in reference to a 'marketing agent' appointed by the appellant, as not only the word 'ejen pemasaran' was used, but also the word 'dan sebagai ejen pemasaran untuk 8 Kia Peng projek tersebut, tanggungjawab I

TE Asia Properties Group Sdn Bhd hanya adalah untuk memasar dan menjual projek tersebut'. This clearly refers to TE Asia as being the appellant's marketing agent.

[40] During cross-examination on the police report, Monica Ong (DW1), who is a legally qualified person, confirmed that TE Asia is the appellant's agent when she said as follows:

BT Ok. I think the first part of the report is talking about one purchaser, refers to AED, that is not relevant to us, but you look at page 369. *Look at the second last paragraph it says, "selanjutnya pembeli-pembeli kedua ke sembilan telah memberitahu I-Marcom bahawa syarikat yang bernama TE Asia telah pun memasuki perjanjian GRR scheme dengan mereka dan sekarang pembeli-pembeli tersebut ingin menuntut GRR tersebut daripada I-Marcom Sdn Bhd".* Then you say that you were terkejut and *here, you go on further, you say that "TE Asia Group Sdn Bhd merupakan agen pemasaran untuk 8 Kia Peng". You confirm Monica that based on this police report, the defendant's position is that TE Asia is the marketing agent for 8 Kia Peng*.

ONG: *It is not in this context. So I just do not know –*

JUDGE: *Madam, is your own words.*

ONG: *Yes, I know.* Your Lordship, *I used it very loosely.*

JUDGE: Ok, alright. Tak apa, Mr. Thangaraj, *it is her own words. I will take note of that.*

BT: Very well, My Lord. And Madam, are you aware that it is an offence to make a false police report?

ONG: Yes, I am.

BT: You are. Very well, other words and all that, shall I move on?

JUDGE: Yes, move on. *You already made your point.*

(emphasis added)

(See: encl. 5, p. 161).

[41] The police report is an important and critical document. If TE Asia was not the appellant's agent, surely it would have stated so. However, Monica Ong (DW1), who is a legally qualified person, had clearly stated in her police report that TE Asia is the 'ejen pemasaran', which means the marketing agent for the appellant.

[42] In the case of *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155; [1995] 3 MLJ 283; [1995] 1 MLRA 708; [1996] 1 AMR 007; the Court of Appeal held:

> [10] ... Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise. (emphasis added). Earlier, in his judgment,

he said, *Now there are cases – business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.*
(emphasis added)

Sales Brochure

[43] The appellant had by way of their defence taken the stand that:

(i) TE Asia is an underwriter pursuant to the underwriting agreement;

(ii) TE Asia is not authorised to hold itself as an agent or representative of the appellant; and

(iii) TE Asia is not authorised to make offers or representations on the GRR scheme.

[44] However, based on evidence and contemporaneous documents presented before this court, we are of the view that TE Asia was the duly authorised agent of the appellant.

[45] We find that the respondents had relied on the sales brochure and representations made by Edward Lim, who was the marketing executive of TE Asia, and they were in turn the authorised agent of the appellant.

[46] The preparation of a sales brochure in respect of a housing development is governed by HDA in order to protect the interests of purchasers and to prevent the purchasers from dealing with unauthorised agents.

[47] Under the HDR, any advertisement (which includes a brochure) can only be prepared after an advertisement and sale permit is issued (regs. 5 and 6 of the HDR).

[48] Therefore, it is the duty of the housing developer to issue a brochure to each purchaser which would include the particulars in reg. 6(1) of the HDR. The particulars include the 'authorised agent'.

[49] In our present case, TE Asia was held out or regarded as the exclusive marketing agent for the appellant, but after the sale had been completed, the appellant took a completely different stand on the role played by TE Asia in the sale of the four condominium units.

[50] The appellant had obtained the advertisement and sale permit dated 10 December 2014, and the permit number is 13802-1/12-2016/01243(P) with an expiry date from 9 December 2014 to 8 December 2016. The same permit number, expiry date, authorised agent and mandatory particulars to be stated in accordance with reg. 6(1) of the HDR are also stated in the sales brochure which was handed over by Edward Lim to Resham.

[51] Given the above, we are of the view that the appellant cannot deny the fact that the sales brochure was prepared by the appellant. The appellant also did not produce any other sales brochure which was used by the appellant to market and sell the condominium unit of the project.

[52] The irresistible conclusion is that there was only one sales brochure that was used to sell the condominium units of the project, which stated that TE Asia was the exclusive marketing agent for the defendant.

[53] In the result, based on the contents of the sales brochure and provisions of the HDA and HDR, it is clear that the appellant had represented to the public at large that TE Asia was its authorised agent.

[54] The evidence of Beh (PW2), the real estate agent from Full Homes Realty Sdn Bhd (Full Homes) shows that Full Homes was appointed as a sub-agent to TE Asia to market and sell the condominium units of the project.

[55] Beh (PW2) then requested Resham to attend the launch of the sale of the condominiums on 17 April 2015 at Top Hat Restaurant. Beh (PW2) had informed Resham that Top Hat Restaurant is used by the appellant and TE Asia as their sales office.

(See: encl. 13 Q&A: 6 pp. 277 to 278, encl. 13 Q&A: 9, p. 344).

[56] Top Hat Restaurant is located opposite the project land. Resham testified that when he arrived at Top Hat Restaurant, which was used as the marketing office for the project, there were many interested purchasers, representatives of the appellant and marketing agents from TE Asia. This can be seen from the photographs taken by Beh (PW2) during the launch.

(See: encl. 13, pp. 218 to 226).

[57] During the launch, Beh (PW2) introduced Resham to Edward Lim. Edward Lim gave his name card to Resham and introduced himself as the marketing executive from TE Asia. Edward Lim handed over the sales brochure for the project and informed Resham that TE Asia is the exclusive marketing agent for the appellant.

(See: encl. 8, pp. 181 to 182; encl. 13 - Q&A 6 - p. 278, Q&A 9 - pp. 344 to 345).

[58] Monica Ong (DW1), in her evidence, said that she was not aware of the sales brochure and it was neither prepared nor approved by the appellant.

(See: encl. 4 - p. 95; encl. 5 - p. 130).

[59] However, we find that such evidence is inherently improbable as only persons with all the particulars as required under reg. 6(1) of the HDR would be able to prepare the sales brochure. In the present case, these particulars are only known to the appellant. There was no evidence from Monica Ong

(DW1) to say that any of the facts stated in the sales brochure pertaining to the sale of the project are not true or inaccurate despite being cross-examined on this issue.

(See: encl. 5, pp. 134 to 136).

[60] Further, as mentioned earlier, only the appellant as the developer can apply and obtain the approval of the advertising and sale permit and the sales brochure. (Regulation 5 of the HDR).

[61] Resham, who was cross-examined on the issue of whether the representatives of the appellant were present at the launch, was very clear in his evidence that he met the representatives of the appellant during the launch, and name cards were given to him.

(See: encl. 5, pp. 74 to 76).

[62] We are of the view that, based on the conduct of TE Asia, who were present together with the representative of the appellant during the launch of the project, lends credence to the fact that the appellant was involved in the launch of the project at Top Hat Restaurant.

[63] Besides, Monica Ong (DW1) also testified that it is the practice of the I-Group of Companies to market their condominium by either using the in-house marketing department or by appointing a third-party marketing agent.

[64] Therefore, we are of the view that the appointment of companies such as TE Asia to market the condominium of the project is the normal practice of the I-Group of Companies which includes the appellant.

Underwriting Agreement

[65] Monica Ong (DW1), in her evidence, tried to portray that there was an underwriting agreement in place between the appellant and TE Asia, and TE Asia was allegedly a bulk purchaser.

[66] We find that the stand taken by the appellant that TE Asia was the underwriter for the appellant and not an agent or representative of the appellant is not consistent with the:

(i) contemporaneous documents;

(ii) conduct of TE Asia and the appellant; and

(iii) representations made by Beh (PW2) and Edward Lim to the respondents and other purchasers.

[67] Further, we find the issue of the underwriting agreement was not raised by the appellant when the appellant had the first opportunity to reply to the respondents' letter dated 6 July 2020. In the appellant's letter dated 10 July 2020, nothing was mentioned about the underwriting agreement. On the contrary, the appellant confirmed that TE Asia is the agent for the appellant. (See paras. 30 to 35).

[68] Next, even in the police report dated 21 July 2020, nothing was mentioned about the underwriting agreement. In the police report, the appellant had again confirmed that TE Asia is the 'agen pemasaran' for the appellant. (See: paras. 36 to 41).

[69] It was only in the statement of defence, the appellant had for the first time raised the issue that the underwriting agreement was executed between the appellant and TE Asia, and TE Asia was the underwriter who had agreed to purchase the condominium units of the project in bulk. Further, the appellant also alleged that TE Asia is not an agent or representative of the appellant.

[70] The respondents have no knowledge of the underwriting agreement, and neither the appellant nor TE Asia had at the material time informed the respondents of the underwriting agreement or that TE Asia was the underwriter for appellant.

[71] If indeed there was an underwriting agreement, then surely there would be contemporaneous documents which show that TE Asia had complied with the terms of the underwriting agreement.

[72] However, we find that no documents were produced in court to show that TE Asia had complied with the terms of the underwriting agreement. No evidence was produced to corroborate that the terms of the underwriting agreement were complied with, including the proof of payment of the alleged sum of RM3.5 million under the underwriting agreement, nomination letter and letter to terminate the underwriting agreement.

[73] On the issue of the underwriting agreement, the learned JC decided that the respondents were not aware of the existence of the underwriting agreement and that the underwriting agreement would not assist the appellant in its attempt to negate liability for the representations made by Edward Lim and/or TE Asia. The learned JC had stated as follows:

> 49. I do not find it necessary for this Court to make any determination as to whether this agreement is a sham or otherwise. *What is important is whether the said plaintiffs were aware of the said instrument and whether the existence of this agreement will assist the defendant in its attempt to negate liability for the conduct of Edward Lim or TE Asia*.
>
> 50. On the first issue, *I find that the plaintiffs were not aware of the existence of the underwriting agreement The defendant did not disclose the existence of the said agreement to the plaintiffs and this agreement was only disclosed after proceedings were commenced by the plaintiffs against the defendant*.
>
> 51. As to the second issue, I do not find that the defendant's reliance on clause 16 of the underwriting agreement can assist the defendant in this case. *I accept that the clause 16 does state that TE Asia or its employees are not authorized to represent themselves as an agent of the defendant. However, as this was not disclosed by the defendant at the time the agreements were executed and based on the defendant's own conduct in executing the said agreement, it would mean that*

the defendant did represent to the plaintiffs that these entities, especially that of Edward Lim, had the authority to act as the agent of the defendant. This Underwriting agreement is merely an internal agreement between TE Asia and the defendant and will not negate the plaintiffs' claim against the defendant.

52. Furthermore, I also find that despite clause 16 of the said underwriting agreement, clause 3.1 to *clause 3.6 of the said underwriting agreement, indicates that at the very least the said TE Asia was the defendant's agent for the purposes of procuring purchasers of the said 8 Kia Peng project. The clauses show that TE Asia had the authority, inter alia, to (i) secure purchasers and nominate purchasers, (ii) collect bookings as part payments for the purchase price and (iii) procure the said purchasers to execute the Sale and Purchase Agreements with the defendant. All such bookings and payments from purchasers are to be made directly to the defendant and not to TE Asia*.

53. Therefore, based on the totality of the evidence before me, I reiterate that *TE Asia is the agent of the defendant. The said underwriting agreement, despite clause 16, reinforces the said finding*.

(emphasis added)

[74] Based on the facts and circumstances of the case and evidence tendered before the court, it cannot be said that the findings and conclusions of the learned JC are findings which do not accord with the probabilities of the case taken as whole or the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. See: *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395; [1995] 2 MLRA 432; [1996] 3 AMR 3506 (Court of Appeal). Hence, we see no reason to disturb the findings of the learned JC.

Details Of Purchase Form

[75] Based on the evidence of Monica Ong (DW1), the details of purchase form is a standard document prepared by the appellant and handed to TE Asia.

[76] It is a document under the heading 'I-Marcom Sdn Bhd' which requires all the particulars of the purchaser and the brief particulars of the condominium and terms of purchase to be stated.

[77] This document was requested by TE Asia to be executed by the respondents together with the COPP form and was to be handed over to the appellant with a cheque for RM30,000 payable to the appellant.

[78] The fact that TE Asia had the details of purchase form which had been prepared by the appellant and that TE Asia was collecting the cheque for the partial payment on behalf of the appellant shows rather convincingly that TE Asia was an authorised agent of the appellant.

[79] Nothing is stated in any of these documents that TE Asia is not the authorised agent of the defendant. Logically, a purchaser is not likely to issue a cheque for RM30,000 for each of the four condominium units which amounts to RM120,000 and hand over these cheques to Edward Lim if TE Asia was not the authorised agent for the appellant.

Conditional Ownership Package Plan Form (COPP Form)

[80] The COPP form basically states the following:

(i) selling price, 10% discount and net selling price;

(ii) first 10% payment after signing of the SPA; and

(iii) option given to purchasers to select the following:

(a) complimentary SPA legal fees;

(b) GRR scheme for five years at 5% per annum of the purchase price; and

(c) bank loan or cash purchase.

[81] From the executed COPP forms, the respondents have selected the following:

(i) complimentary SPA legal fees, which means the appellant will appoint a solicitor to prepare the standard SPA, and the fee will be paid by the appellant;

(ii) the four condominium units will be fully furnished;

(iii) GRR scheme for five years at 5% per annum of the purchase price; and

(iv) the balance of the purchase price to be paid by bank loan.

[82] In the 'remarks' column, it is stated in handwriting that '10% base on 3+3+4 which will be dispense on 2A, 2B, 2C'. (See: encl. 13, pp. 192, 194, 196, and 198).

[83] The appellant takes the position that the COPP forms were not prepared by the appellant and allegedly has no knowledge of this document.

[84] Upon perusal of the contents of the details of purchase forms and COPP forms, it will be evident that apart from what is stated in the details of purchase forms, which particulars were used to prepare the respective SPAs, the contents of the COPP forms form part of the collateral contract between parties.

[85] Ranita and Resham had testified that the appellant had given a 10% discount, and the manner in which the discount would be given is as stated in the 'remarks' in the COPP forms. Ranita and Resham had also testified that the 'remarks' means that the discount of 10% will be given progressively at 3%, 3% and 4% when the stage of billing reaches the completion at stage

2(a), (b) and (c) as stated in the third schedule (schedule of payment of purchase price) of the respective SPAs. The fact that the rebates were given by the appellant based on the 'remarks' can be seen from the defendant's statement of accounts.

[86] Monica Ong (DW1) and Chua (DW2), during cross-examination, had testified that a 10% rebate was given to the respondents and confirmed the fact that the 10% is not reflected in the SPAs.

[87] Based on the evidence produced before the court, we find that the following vital evidence of Resham and Ranita were not challenged by the appellant during the cross-examination of the respondents, namely:

(i) 10% rebate given by the appellant based on the remarks in the COPP forms;

(ii) four condominium units were fully furnished; and

(iii) the legal fees for the SPAs were borne by the appellant.

[88] We are of the view that the consequence of the failure to cross-examine on this vital evidence in respect of the facts in relation to the COPP forms is that there is only one version left for the court's consideration – that is the COPP form which is a form prepared by the appellant and the appellant had full knowledge of the contents of the COPP form as the appellant had complied with all the conditions opted by the respondents except for the GRR scheme. Therefore, the appellant cannot now say that the appellant is not aware of the GRR scheme.

[89] Therefore, based on the facts and circumstances of the case, testimony of the witnesses and contemporaneous documents tendered during the trial, we are of the view that Edward Lim and/or TE Asia was an agent of the appellant.

Issue (ii): Whether Edward Lim And/Or TE Asia Made The Purported Representations

[90] Based on the evidence presented before the court, we are of the view that TE Asia and/or Edward Lim has made representations as alleged by the respondents in the SOC on the GRR scheme.

[91] This can be gleaned from the evidence of Resham and Ranita as follows:

(i) around 17 April 2015, Beh (PW2) informed Resham that the project is a viable and the appellant is offering the GRR scheme and upon the invitation from Beh (PW2), Resham attended the launch of the project at the Top Hat Restaurant;

A (ii) at the Top Hat Restaurant, Resham was introduced to Edward Lim by Beh (PW2) and Edward Lim had introduced himself as the exclusive marketing agent from TE Asia for the sale of the condominium units of the project;

B (iii) Edward Lim had handed over the sales brochure of the project and explained the potential of investing in the project and represented that the appellant had agreed to offer to the interested purchasers a GRR scheme;

C (iv) Edward Lim represented to Resham that the purchase price is slightly higher compared to the other condominiums around KLCC as the appellant had agreed to offer to the purchasers who are interested in the GRR scheme;

D (v) Edward Lim represented to Resham that the appellant is offering a GRR scheme for a period of five years commencing from the date when vacant possession is delivered at 5% per annum of the purchase price;

(vi) thereafter, Edward Lim handed to Resham the details of purchase forms and also COPP forms where the purchaser can elect to choose the GRR scheme;

E (vii) on 23 April 2015, when Beh (PW2) attended to the signing of the new details of purchase forms and COPP forms with the names of the second to fifth plaintiffs included, Beh (PW2) again informed Ranita and Kalwant that the appellant is offering the GRR scheme to interested purchasers;

F (viii) during the signing of SPA-1 and SPA-2 on 3 July 2015, Edward Lim had informed Resham, Ranita, and Kalwant that the appellant will execute the GRR scheme agreement at a later date;

G (ix) during the execution of SPA-3 and SPA-4, in the presence of Resham, Ranita and Kalwant, Edward Lim had again informed Rajash and Resham JR that the appellant will execute the GRR scheme agreement at a later date; and

H (x) subsequently when Ranita made repeated calls to Edward Lim for the execution of the GRR scheme agreement, Ranita was informed that the appellant will execute the GRR scheme agreement once vacant possession is delivered.

[92] Further, we find that the COPP forms are contemporaneous documents which support the fact that the appellant had offered the GRR scheme which the respondents have accepted.

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[93] More importantly, we find that TE Asia had not only made the representation on the GRR scheme to the respondents, but also to the other purchasers of the project. This can be seen from the COPP forms which were signed by other purchasers.

[94] The fact that TE Asia had made the representation on the GRR scheme to the respondents and other purchasers is also admitted by the appellant in the police report dated 21 July 2020 made by Monica Ong (DW1) on behalf of the appellant.

[95] From the police report, it is evident that the appellant had admitted that the oral representations on the GRR scheme were made by TE Asia to the respondents and other purchasers but allegedly it was without the consent of appellant.

[96] Based on the evidence of Resham, Ranita, Beh (PW2) and the contemporaneous documents in the present case, it is evident that the appellant had through TE Asia offered the GRR scheme which is 5% per annum on the purchase price commencing from the date of delivery of vacant possession. The respondents accepted the GRR scheme offered by the appellant through its authorised agents.

[97] On this issue of representation, we find that the learned JC had made an affirmative finding as follows:

> 26. Firstly, I am of the opinion that the evidence presented by the plaintiffs' witnesses, Resham Singh a/l Naranjan Singh and Ranita Kaur Resham Singh, *are consistent with the documents before me and is supported by the evidence of Beh Seok Tee*.
>
> 27. Most crucially, I find that despite the denials by defendant and the evidence of Ong Poh Ling and Chua Beng Hua, *the evidence indicate that such representation were made by the said Edward Lim on behalf of TE Asia and were endorsed through the conduct of the defendant*.
>
> 28. I find that *Conditional Ownership Package Plan executed by the third plaintiff clearly show that the units purchased by the plaintiffs had the following additional characteristics that did not appear in the Sale and Purchase Agreements*. They were, (i) *the discount to be afforded for the units purchased,* (ii), *the units were to be fully furnished* and (iii) that *the legal fees for the sale and purchase agreements will be borne by the defendant. These characteristics or details did not appear in the Sale and Purchase Agreement but were additional terms or additional warranties promised by the defendant through Edward Lim or TE Asia*.
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> 29. *Despite these details not specifically mentioned in the Sale and Purchase Agreements, parties did act, on these terms*. Ong Poh Ling and Chua Beng Hua agreed during cross-examination that the *discounts to the units were allocated for the plaintiffs. The fact that the units were fully furnished and that the fees will be borne by the defendant were also confirmed by the said witnesses called by the defendant*. This despite *these particulars not appearing in the Sale and Purchase Agreements*.

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30. I take it particularly clear *the discount to the said units were provided for the units purchased based on the information obtained from sales*. These details were also missing from the Details of Purchase document numbered 10073, 10072, 10071 and 10074 executed by the first and second plaintiffs at the time the units were booked in the presence of Edward Lim and Beh Seok Tee.

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31. The fact that *the discounts were provided, the units were fully furnished and that the legal fees were paid by the defendant*, despite they were not specifically provided in the Sale and Purchase Agreements and the Details of Purchase Document executed, indicate to me that the evidence of the plaintiffs' witnesses are true and correct. *Despite these details being missing*

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from the Sale and Purchase Agreements, the defendant did provide these incentives and additional items to the plaintiffs.

32. Therefore, *I find that it is more likely than not that the said representations, as alleged by the plaintiffs, were made by Edward Lim and/or TE Asia to the first, second and third plaintiffs as alleged. defendant clearly did act in accordance with*

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the Conditional Ownership Package Plan by granting the discount and by providing the features of the said package sans (sic) the GRR scheme. The version of events as suggested by the plaintiffs is consistent with the documentary evidence presented before me.

(emphasis added)

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[98] Given the above and based on evidence and contemporaneous documents presented before this court, we see no reason to disagree with the findings of the learned JC.

Issue (iii): Whether The GRR Scheme Is Illegal

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[99] We turn next to the issue of whether the GRR scheme is illegal. Counsel for the appellant submits that the GRR scheme is tainted with illegality.

[100] In this regard, it was argued for the appellant that the GRR scheme, which is a commitment by the appellant (as part of the terms of the COPP forms) to guarantee a certain rental yield, is an inducement to the public to

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purchase the strata property and that this is illegal.

[101] The counsel for the appellant contended that a promise of a guaranteed rental yield by the appellant conflicts with the HDA and HDR. He further said that the GRR scheme does not sit comfortably with the HDA

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framework, because in allowing the so-called promises made by the marketing agent on the GRR scheme, it would be akin to allowing a collateral warranty to an HDA contract, and this would, in turn, subvert the legislative policy underlying the enactment of the HDA.

[102] In amplification, counsel said that the allurement *via* the GRR scheme

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would leave HDA purchasers to empty promises on the GRR scheme which may not translate into or yield any pecuniary benefit depending on the financial ability of the developer.

[103] Counsel also said that the GRR scheme, by its very nature, has the potential to induce any purchaser, as compared to just a developer's offer of just furniture or fittings.

[104] In this context, we were referred to para. 8.3 of the defence that was filed by the appellant which reads as – "Further, or in the alternative, if the representations were made, which is denied, they could not have been treated as being valid in law given that they related to the subject of guaranteed rental return which is regulated by law".

[105] Counsel said that certain benefits like financial rebates, fittings or furniture which do not subvert or contradict the underlying policy of the HDA are permissible.

[106] On the other hand, counsel for the respondents submitted that there was no illegality. He said that the GRR scheme did not in any way contradict or subvert the HDA or the HDR and that as a developer, the appellant was free to add terms by way of a separate agreement or side letter (here it was by way of the COPP) which confers a benefit on the purchasers by way of the GRR scheme.

[107] Counsel for the respondent supported his argument by alluding to the following passage from the Federal Court's decision in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 1 MLRA 506; [2021] 2 MLJ 60; [2021] 3 AMR 449 (*PJD Regency*), where it was stated at para. [122] as follows:

> [122] We agree with the views of the High Court and the Court of Appeal. It is a trite principle of law that where a statute prescribes a form under the umbrella of social protection, such provisions may be contracted out of provided that the terms of the agreement are favourable to the purchasers (see *Sea Housing* (*supra*)).

[108] In response, counsel for the appellant said that para. [122] of *PJD Regency* (*supra*) stated the statutory HDA may be contracted out "provided that the terms of the agreement are favourable to the purchasers" is not to be read as including financial schemes such the GRR scheme as this would have a direct impact on the appellant in circumstances where the appellant's financial ability to meet its obligations to make payments under the GRR scheme had not even been ascertained.

[109] Thus, the question for us is whether an offer of the GRR scheme by the appellant, as a licensed housing developer, to the respondents, who are purchasers of residential properties *via* a side agreement or letter of offer, in addition to the statutory SPA prescribed under Schedule H of the Regulations, violates the HDA.

[110] It is, of course, trite that the HDA is a social legislation designed to protect house buyers, and its standard sale and purchase agreement (Schedule H) form is a statutory contract.

[111] It follows that any added burdensome or detrimental clauses beyond Schedule H would be unenforceable as part of the statutory contract. However, a collateral benefit, *ie*, a separate promise or bonus offered by a developer in addition to the statutory contract, does not *per se* invalidate Schedule H, so long as it does not alter or interfere with its mandated terms.

[112] In this regard, it is imperative for us to have regard to the Court of Appeal's decision in *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 1 MLRA 473; [2008] 4 MLJ 852 which establishes a key legal principle: a housing developer is bound by the prescribed statutory terms and conditions under Schedule H of the HDR, and cannot impose additional terms that are more onerous or burdensome on the purchaser.

[113] The *ratio* is that statutory contracts like the SPA under Schedule H have a consumer protection purpose, and developers cannot contract out of or vary these provisions in a way that defeats that purpose.

[114] In *Sentul Raya* (*supra*), the Court of Appeal emphasised that the statutory form of the SPA under the HDR (specifically Schedule H) is mandatory and cannot be derogated from to the purchaser's detriment. Hence, any clause inconsistent with the prescribed form – particularly one that imposes additional burdens or disadvantages on the purchaser – would be void.

[115] What this means is that whilst terms more onerous cannot be imposed on the purchaser, the developer is free to add terms by way of a separate agreement or side letter which confers a benefit on the purchaser, for example, the GRR scheme.

[116] As mentioned earlier, the case of *PJD Regency* (*supra*) had already endorsed the grant of benefits by the developer outside the four corners of the statutory contract. At para. [122], the Federal Court said:

> [122] We agree with the views of the High Court and the Court of Appeal. It is a trite principle of law that where a statute prescribes a form under the umbrella of social protection, such provisions may be contracted out of **provided that the terms of the agreement are favourable to the purchasers** (see *Sea Housing* (*supra*)).
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> (emphasis added)

[117] In the present case before us, the GRR scheme is certainly not a burden on the purchasers. Instead, it is a financial boon and amounts to a separate benefit, not a deviation from or alteration to any clause under Schedule H. It is an ancillary promise made to incentivise purchase, but does not supersede or modify statutory rights or obligations in the SPAs.

[118] In our view, the developer retains the right to add such benefits, provided the statutory form remains intact and unaltered. There is no legal principle in the HDA or HDR that categorically prohibits additional incentives – even if these have the effect of inducing the buyer.

[119] It bears repeating that the GRR scheme does not impose any extra obligation on the purchaser, nor does it diminish any statutory protection under the HDA. It remains a voluntary undertaking by the developer. It neither affects regulated pricing, payment schedules, nor fundamental buyer rights.

[120] It is important to emphasise that the core objective of the HDA is to prevent unconscionable obligations or exclusions placed upon purchasers. When viewed in this way, we find that the GRR scheme does not burden buyers.

[121] On the contrary, the GRR scheme is supplementary to and benefits the purchasers (respondents) and does not undermine their statutory rights.

[122] In the circumstances, the appellant's assertion that the GRR scheme is "illegal" is untenable. We find that the statutory contract (the SPAs) under Schedule H of the HDR is intact and fully operative, and the GRR scheme remains a valid and collateral benefit which does not directly or indirectly contravene the HDA or the HDR. As such, we do not agree with the appellant that the GRR scheme suffers from any form of illegality.

Issue (iv): Whether The Purported Representations Were Binding On The Appellant

[123] Having made the findings on the above three issues, we are of the considered view that the representations made by Edward Lim, who is the authorised agent of TE Asia who is an exclusive agent for the appellant, that the project comes with the GRR scheme and the GRR scheme arrangement will be executed at a later date is binding on the appellant.

[124] From the evidence before the court, we find that the offers made in the COPP forms, which include the discount, free legal fees, furnishing and GRR scheme, were made by the appellant through TE Asia.

[125] Further, at all material times, TE Asia had the actual or implied and apparent authority to bind the appellant on the GRR scheme, *inter alia*, for the following reasons:

(i) at all material times, TE Asia had acted and/or held out as the exclusive marketing agent of the appellant to market and sell the condominium units of the project;

(ii) the sales brochure for the sale of the condominium of the project, which was prepared and/or approved by the appellant, states that the condominiums were 'exclusively marketed by TE Asia';

(iii) Edward Lim and Beh (PW2), on behalf of TE Asia, had acted as the agent or representative of the appellant;

(iv) TE Asia, through Edward Lim and Beh (PW2), had informed the respondents and other purchasers that the appellant had proposed the GRR scheme to purchasers who are interested;

(v) the fact that TE Asia had proposed the GRR scheme on behalf of the appellant is consistent with the contemporaneous documents and on the representations made by Edward Lim and Beh (PW2);

(vi) Edward Lim and Beh (PW2), being the authorised agents and sub-agents of TE Asia, respectively, had arranged for the respondents to be at the office of the appellant's solicitors to execute the SPAs and deed of mutual covenants;

(vii) the GRR scheme proposed by TE Asia was within its implied or usual authority in the ordinary course of dealing as a marketing agent to sell the condominiums; and

(viii) even in the appellant's letter dated 10 July 2020 and the police report dated 21 July 2020, the appellant had admitted that TE Asia is the agent of the appellant.

[126] Given the above, we are of the view that the respondents were induced to enter into the SPAs as a result of the representations made by Edward Lim and the appellant had failed to fulfil the representations which were made to the respondents, and the appellant is bound by the representations made by Edward Lim on behalf of the appellant as the exclusive agent.

[127] The Federal Court in the case of *Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd & Another Case* [1985] 1 CLJ 533; [1985] CLJ (Rep) 64; [1984] 1 MLRA 555, [1985] 1 MLJ 350 had decided that:

> [7] ... It is necessary at the outset to distinguish between an 'actual' authority of an agent on the one hand, and an 'apparent' or 'ostensible' authority on the other. Actual authority and apparent authority are quite independent of one another. *Generally they co-exist and coincide, but either may exist without the other* and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor *normally relies in the ordinary course of business when entering into contracts*.
>
> An 'actual' authority is a legal relationship between principal and agent created by the consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To *this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor* ...

An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. *The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppels preventing the principal from asserting that he is not bound by the contract It is irrelevant whether the agent had actual authority to enter into the contract*.

In ordinary business dealings to contractor at the time of entering into the contract can in the nature of things hardly ever rely on the 'actual' authority of the agent. *His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority*, *or upon the representation of the agent, that is, warranty of authority*.

(emphasis added)

[128] Based on the above, we are of the view that based on the evidence of Resham, Ranita and Beh (PW2) and the contemporaneous documents, the appellant is bound by the representations made by Edward Lim on behalf of TE Asia as TE Asia had the apparent and ostensible authority to make the representation on the GRR scheme.

[129] On this issue of representation, in deciding that the appellant is bound by the representations made by Edward Lim and/or TE Asia, the learned JC decided that:

40. Therefore, based on the circumstances of this case, *I find that the defendant by affirming the agreements that were executed by the plaintiffs had acquiesced that the said defendant is its agent and had the requisite authority to make such representations that were made by the Edward Lim and/or TE Asia. As such, I find that the defendant is bound by the representations made by Edward Lim and/or TE Asia*.

41. Having considered the evidence of the plaintiffs and the defendants witnesses, I prefer the evidence of the plaintiffs' witnesses. *I find that the plaintiffs witnesses evidence are consistent with the documents as presented before me, and are consistent with the conduct of parties*. Glaringly, *the defendant gave the discounts and furnished the units as indicated by TE Asia* and this was not part and parcel of 'the Sale and Purchase Agreements'. This to me shows that *the defendant was aware what was being undertaken by TE Asia and confirmed the said representations by TE Asia. These details, the discount and furnishing of the units, are part and parcel of the Conditional Ownership Package Plan. This would include the representations relied upon by the plaintiffs. Therefore, the defendant is bound by the representations made by TE Asia and as reflected in the Conditional Ownership Package Plan*.

(emphasis added)

[130] Based on the evidence produced before the court, we see no basis for disturbing the findings of the learned JC.

Other Issues

Adverse Inference

[131] The appellant submitted that an adverse inference under s. 114 illustration (g) of the Evidence Act 1950 should be invoked against the respondents for failure to call Edward Lim.

[132] We have perused the evidence given by Beh (PW2) in her witness statement when she testified as follows:

> Q17: *Are you still in contact with Edward Lim?*
>
> A17: The last I contacted Edward Lim, was on the 14th October 2022. The reason I contacted Edward Lim was to find out whether he had anymore information pertaining to this case and *whether Edward Lim is agreeable to testify in the present case*. Edward Lim confirmed the facts relating to the GRR scheme and the representations made to the firstplaintiff as stated in my witness statement but *refused to attend Court*.
>
> Q18: *Do you know Edward Lim's full name or address*?
>
> A18: No, I do not know *and I am not able to provide to the third plaintiff the full name and address of Edward Lim as he refused to disclose to me*.
>
> (emphasis added)

[133] We are of the view that in the absence of a full name, identity card number and address, it is impossible for the respondents to subpoena Edward Lim. Further, we find that the appellant did not challenge the following facts:

(i) that the respondents do not have the full name, identity card number and address of Edward Lim;

(ii) Edward Lim is the marketing agent of TE Asia; and

(iii) the appellant's own investigation had concluded that TE Asia had made the representations on the GRR scheme. (See: Police report made by Monica Ong).

[134] The respondents have given sufficient and cogent explanations as to why the respondents were not able to call Edward Lim, who happens to be the employee of the appellant's own marketing agent.

[135] Further, we find that based on both oral and documentary evidence, the respondents have discharged their burden to prove their case that:

(i) TE Asia is the marketing agent of the appellant; and

(ii) the representations in respect of the GRR scheme were made by Edward Lim and Beh (PW2) to the respondents.

[136] In light of those mentioned above, we are of the view that an adverse inference under s. 114 illustration (g) of the Evidence Act 1950 cannot be drawn against the respondents.

Representations Were Only Made To Resham (First Respondent)

[137] The appellant contended that the purported representations were made only to the first respondent and not the remaining respondents, and therefore, the second to fifth respondents are not entitled to make a claim on the basis of the purported representations.

[138] Upon perusal of the appellant's pleading, we find that it is not the pleaded defence of the appellant that the respondents' claim is to fail in its entirety, as the representations were allegedly not made to all the respondents. This issue was also not put to any of the respondents' witnesses.

[139] It is to be noted that the first respondent was the main protagonist who purchased all four condominium units and paid for the deposit. That is the crucial factor as to why all the respondents subsequently executed the SPAs. The respondents were induced to execute the SPAs based on the representations made to the first respondent. Despite the execution of the four SPAs, it was a composite purchase made by the first respondents which led to the execution of the SPAs. This fact is not denied by the appellant.

[140] In the event the representations on the GRR scheme were not made to the first respondent, none of the respondents would have executed the SPAs.

[141] More importantly, we find that it is in evidence that Edward Lim and Beh (PW2) had made the same representations to all the other respondents.

(See: encl. 13, pp. 313 to 314, encl. 5, pp. 95 to 97).

[142] On this issue, the learned JC had said as follows:

> [23] I find that the *plaintiffs have proven to this Court that Edward Lim and/ or TE Asia did make the representations concerning the GRR scheme and that the said representations did induce them to enter the agreements referred to earlier.*
>
> ...
>
> [44] I also agree with the plaintiffs' contention that the said representation was intended to induce them to enter the said agreements. *The said representations included promises* (i) to provide the discount as stated in the Conditional Ownership Package Plan, (ii) that the units will be fully furnished and (iii) *that the said units will be subject to the GRR scheme.* I find that the evidence of the *plaintiffs' witnesses that they had entered the said agreements based on the said representations are credible and I do not find reason not to believe the said witnesses.*
>
> [45] I also find that *the actions of the plaintiffs, in particular the third plaintiff, following up with the defendant* on the GRR scheme after vacant possession was delivered *indicate to me that they had relied on the said representations and had a genuine belief that the said representation was genuine.*

A [48] It would be inequitable in the circumstances of this case, for this Court to hold otherwise. *It is clear to me that the said representations concerning the GRR was made by Edward Lim as an agent of the defendant to induce the plaintiffs to enter into the agreements for the 8 Kia Peng Units. The existence of the GRR scheme was intended as a warranty and the said Edward Lim convinced the plaintiffs that a subsequent agreement will be entered once the units were ready for*
B *delivery*.

(emphasis added)

Whether The Respondents Enlarged Or Improved Their Claim Through Reply To Defence

C **[143]** The appellant submitted that the respondents' alternative claim by way of reply should not be entertained by the court. This is because the Rules of Court 2012 (ROC) made clear the requirement that a plaintiff must plead its entire case in the SOC.

[144] Additionally, the appellant contended that the respondents' alternative
D claim was stated in response to the appellant's defence that it had not appointed TE Asia nor Edward Lim as its exclusive marketing agent. It was not the appellant's pleaded case that it had not authorise TE Asia to hold itself out as the appellant's agent. This distinction was crucial. It must be borne in mind that it was the appellant's case that TE Asia was an
E underwriter of the project.

[145] The appellant further contended that the respondents' alternative claim was thus a new cause of action which was not advanced in the SOC and, in any event, was inconsistent with the particulars in the SOC wherein the respondents pleaded that TE Asia was the "exclusive marketing agent"
F of the appellant. Therefore, the respondents had to be held strictly to their pleaded case, more so for their claim being grounded on fraudulent misrepresentation.

[146] Based on the above, we find that, the respondents' claim is founded on the following fact:

G

(i) representations made by the appellant's agent that there would be a GRR scheme; and

(ii) the GRR scheme agreement would be executed after vacant possession is delivered.

H **[147]** The fact that the representations made by TE Asia on the GRR scheme to the respondents are not disputed by the appellant. But, the only pleaded defence of the appellants is that TE Asia is not the agent of the appellant.

[148] Upon perusal of the SOC of the respondents, especially in paras. 28
I to 32, we find that the pleaded case of the respondents for fraudulent misrepresentation is clear and unambiguous.

[149] It has to be noted that prior to the filing of this claim, the appellant, in its letter dated 10 July 2020 in reply to Ranita's letter dated 6 July 2020, did not dispute the fact that TE Asia is the exclusive agent of the appellant and in fact admitted that TE Asia was its agent, where it was stated in the letter that:

> Notwithstanding anything to the contrary, we state that we had **terminated TE Asia Properties Group Sdn Bhd as our agent**, and TE Asia Properties Group Sdn Bhd has also been wound up. We hereby officially confirm that we have no knowledge of the GRR arrangement, and we are not involved in whatsoever GRR arrangement with any party.
>
> (emphasis added)

[150] We noticed that only in the statement of defence, the appellant, for the first time, took the position that TE Asia is not the appellant's agent. Since this issue was raised at the defence stage, in the reply dated 19 July 2021, which was filed subsequent to the statement of defence, the respondents had further elaborated on the facts as to why TE Asia is the agent of the defendant.

[151] Looking at the pleadings as a whole, we agree with the respondents' submission that what the respondents have pleaded in the reply is merely to explain matters raised in the defence and it relates to the pleaded case of the respondents that TE Asia is the agent of the appellant and the appellant is bound by the representations made by TE Asia that a GRR scheme will be honoured after vacant possession is delivered.

[152] We find support for our view by referring to the Court of Appeal's case of *Khazanah Jaya Sdn Bhd v. Hisco (M) Sdn Bhd* [2021] CLJU 2196; [2021] MLRAU 241; [2022] 5 MLJ 744, when it held as follows:

> [44] Learned counsel for the appellant had referred to the judgment of my learned brother Lee Swee Seng J (as he then was) in *Accolade Land Sdn Bhd v. Mass Rapid Transit Corporation Sdn Bhd & Ors* [2017] MLJU 1868 in support of his contention *that the respondent had supplemented the statement of claim by the additional facts pleaded in the Reply to Defence*, and that this is not permitted in law. Whilst we agree that as a general rule a party cannot supplement the statement of claim through the reply to defence, *we do not find the respondent had in this case, supplemented their case, by merely answering, specifically, the plea of limitation raised by the appellant in the defence. In fact, the pronouncement* of my learned brother in *Accolade Land Sdn Bhd v. Mass Rapid Transit Corporation Sdn Bhd & Ors supports the respondent's position*. In this regard it would be appropriate to quote the relevant passage from the judgment of Lee Swee Seng J (as he then was):
>
> > [103] It follows from the cardinal principle that a plaintiff is not allowed to supplement its statement of claim by including in its reply, matters that should have been pleaded in the statement of claim. The Singapore High Court case of *Nirumalan K Pillay & Ors v. A Balakrishan* [1997] 1 SLR 322 stated as follows this principle at p 326, para 10:

> *... Further, because the function of a reply is to answer matters raised in the defence, its contents must relate to matters raised in the defence. What is the same thing, the plaintiffs may not supplement his statement of claim by including in his reply matters which ought to have been included in the statement of claim*. In this respect, a reply is analogous to re-examination of a witness which should be confined to matters touched on in crossexamination. Fresh evidence adding to or re-affirming evidence-in-chief is not permitted in re-examination.

[45] The respondent, as plaintiff in this action, *must specifically plead and identify their cause or causes of action against the appellant/defendant in the Statement of Claim* (see *Yap Seong Yee v. Eureka Property Management Sdn Bhd And Another Appeal* [2018] 6 MLJ 799). *This the appellant has done. There is no requirement in law for the appellant, as plaintiff, to plead in the statement of claim facts in anticipation of the respondent's defence*. Learned counsel for the appellant argues that the respondent ought to have amended the Statement of Claim to include the fact of the repayment of the loan being conditional after completion of the IKBN project, instead of doing so in the Reply to Defence. *We are of the opinion that in the circumstances of the case the respondent's answer to the plea of limitation taken up in the Reply to Defence was wholly appropriate, as the respondent was merely responding to matters raised in the Defence as it was entitled to. The respondent was neither seeking to supplement nor to amend any defect in the Statement of Claim. It was also not a case of adding a new cause of action in the Reply to Defence*. Hence, we find that nothing turns on this issue.

(emphasis added)

[153] As decided by *Khazanah Jaya* (*supra*), the respondents are not expected to file a SOC in anticipation of the appellant's defence and in a reply, the respondents are entitled to respond to the matters raised in the defence.

[154] Further, we are of the view that the issue that the appellant was taken by surprise was never an issue at any point of time, and the appellant also did not request any further and better particulars pursuant to O. 18 r. 12 of the ROC in the event the appellant is not clear on the pleaded case of the respondents.

[155] The learned JC found that the respondents' reply was merely an extension or detailed the respondents' claim against the appellant when he said as follows:

> 66. Therefore, I do not believe that the defendant is prejudiced and that the statements made in the Reply enables the plaintiff to prepare the same claim that is presented in the Statement of Claim. It would have been different if the Reply constitute a fresh or different cause of action against the defendant.

[156] Therefore, we are of the view that the complaint by the appellant on this issue is untenable and devoid of merit.

Conclusion

[157] As a conclusion, we find that this case does not warrant any appellate interference as the learned JC had correctly allowed the respondents' claim after evaluating the contemporaneous documents and oral evidence of the witnesses. Quite clearly the outcome of this case turned primarily on findings of fact. In our view, based on the evidence led during the trial, it cannot be said that the learned JC's conclusion upon the evidence was plainly wrong. Having considered the matter carefully, and having due regard to the comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case. In our view, the learned JC, having considered all the evidence, was fully entitled to reach his evaluative judgment as per the grounds of judgment. Although the appellant criticised the learned JC's approach and reasoning, we are not persuaded that the learned JC's approach was erroneous, the reasoning flawed or the conclusions wrong. It is apt for us to refer to the salient reminder by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67; [2020] MLJU 1469; [2020] 8 AMR 227; [2020] 6 MLRA 193 where it was said:

> [148] ... As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[158] We therefore dismiss the appellant's appeal and affirm the decision of the learned JC dated 8 March 2023. We also make an order for costs of RM20,000 to the respondents, subject to allocator.